

## **Membership Balance Plan Inland Waterways Users Board**

**Agency:** Department of Defense

- 1. Authority:** The Secretary of Defense, pursuant to 33 U.S.C. § 2251, the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended) and 41 CFR § 102-3.50(a) (authorized by law), established the Inland Waterways Users Board (hereafter referred to as “the Board”).
- 2. Mission/Function:** The Board, under the provisions of 33 U.S.C. § 2251 and FACA, shall provide independent advice and recommendations to the Secretary of Defense and the Department of the Army on matters relating to construction and rehabilitation priorities and spending levels on the commercial navigation features and components of the U.S. inland waterways and inland harbors as defined in Public Law 95-502 and amended by Public Law 99-662.
- 3. Points of View:**

The Department of Defense (DoD) has a long standing agreement with the Defense congressional oversight committees that DoD will refrain from using representative members on advisory committees established or supported by the Department. This policy is essentially codified in Department of Defense Instruction 5105.04, “Department of Defense Federal Advisory Committee Management Program”, dated August 6, 2007, and affirmed in each advisory committee’s charter.

In 2010 the Department of the Army, concerned about confusion over the Board’s member designation, asked the Secretary of Defense’s Director of Administration and Management (DA&M) to review the issue. The Office of the Advisory Committee Management Officer (ACMO) for the Department of Defense, on behalf of the DA&M, conducted a thorough review of the Board’s authorizing legislation; its operations; decisions by the Office of Government Ethics; and reports by the Government Accountability Office.

Based upon the ACMO’s review, the DA&M, in consultation with the Office of General Counsel (OGC) for the Department of Defense, determined that Congress, when it established the Board, intended for the Board’s membership to represent the interest of the member’s employer and other inland waterways users and shippers. Accordingly, the DA&M, on behalf of the Secretary of Defense, affirmed that the Board shall be composed of not more than 11 representative members instead of special government employee members and, that the Board member will represent the interests of his or her employer and the overall interests of the primary users and shippers of the U.S. inland and intracoastal waterways.

In accordance with the Board’s authorization, members will represent a balance of primary user and shippers on the inland and intra-coastal waterways, including at least one representative of each of the following: Upper Mississippi River; Lower Mississippi River Ohio River; Gulf Intra-coastal Waterway – West; Gulf Intra-coastal Waterway – East; and the Columbia-Snake River System. Balance also will be maintained between shippers and carriers, as well as among a range of commodities and a range of ton-miles of cargo moved on the waterways.

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In addition to the primary users and shippers invited by the Secretary of Defense, the Secretary of the Army shall designate, and the Secretaries of Agriculture, Transportation and Commerce may each designate a representative to act as an observer of the Board. These observers, who have no voting rights, shall be full-time or permanent part-time employees of his or her respective agency, and may participate in Board discussions when technical information on their respective agencies is requested by the Board.

#### **4. Other Balance Factors:** Not Applicable

#### **5. Candidate Identification Process:**

The Department of the Army, as part of its process for identifying potential candidates, carefully reviewed the feasibility of developing a rotational list for ensuring balance representation among the primary users and shippers, but came to the conclusion that user/shipper proprietary information and the sheer number of primary users/shippers made such an effort impractical. Instead the Army, with the support of the affected users/shippers, developed a process that best ensures balanced representation among the primary users and shippers. That process is:

- a) The Army announces Board vacancies through the Federal Register whereby organizations, companies or individuals can nominate companies (primary users/shippers) as potential Board members.
- b) The Army reviews the nominees and then uses a decision matrix to array each company and whether they meet one or more of the statutory membership requirements; the Army's decision matrix includes both the incumbent members and the potential nominees.
- c) The Army eliminates from consideration any company that does not meet at least one of the statutory membership requirements or those already represented on the Board.

Based upon the number of vacancies, the Department of the Army nominates those primary commercial users and shippers that provide a broad representation of commercial users and shippers, regions, commodities, and ton-miles of cargo moved on the waterways. Primary users and shippers may be represented on the Board for a two-year term of service, and no primary user or shipper can serve more than two terms of service (total of four years) without a break of at least two years.

Prior to the formal nomination, the list of potential organizations undergoes a review by the Department of Defense Office of General Counsel (DoD OGC) and the Office of the Advisory Committee Management Officer to ensure compliance with federal and DoD governance requirements. For example, compliance with the advisory committee's charter and the membership balance plan.

Following this review the Secretary of the Army formally nominates the potential organizations to the Secretary of Defense for approval; pursuant to DoD policy only the Secretary of Defense and the Deputy Secretary of Defense can invite or approve the appointment of individuals to advisory committees established or supported by the Department of Defense. After the Secretary of Defense's approval the Department of the Army notifies the invited organizations, and each organization then designates who will represent the organization's interests on the Board. Should a sufficient number of

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vacancies occur to significantly change the Board's balance or impede its ability to perform its duties, an early selection process may be initiated in accordance with procedures for selection of representatives.

- 6. Subcommittee Balance:** Upon DoD approval and according to DoD policies/procedures the Board may establish subcommittees, as necessary and consistent with its mission. Establishment of subcommittees will be based upon a written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense or the advisory committee's sponsor.

The Secretary of Defense or the Deputy Secretary of Defense shall approve the selection of representatives to subcommittees in the same manner that representatives to the Board are selected, and these individuals may come from the parent committee or new nominees, as recommended by the advisory committee's sponsor and based upon the matters under consideration.

As required by the Board's charter, these subcommittees operate under the provisions of FACA, the Government in the Sunshine Act of 1976 (5 U.S.C. § 552b), governing Federal statutes and regulations, and governing DoD policies/procedures.

- 7. Other:** The Department of Defense adheres to the rules and regulations issued by the Office of Government Ethics and the administration's prohibition against registered federal lobbyists.

- 8. Date Prepared:** April 12, 2012